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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 402

THE WESTERN UNION TELEGRAPH COMPANY,

Petitioner,

vs.

THOMAS P. LESESNE, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, The Western Union Telegraph Company, prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on July 23rd, 1952, as affirms the judgment of the District Court as to the second cause of action.

Opinions Below

The opinion of the Court of Appeals is reported in 198 Fed. 2d 154. Its opinion on the prior appeal is reported in 182 Fed. 2d 135.

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C., Section 1254 (1). The judgment of the Court of Appeals was entered on July 23rd, 1952.

Question Presented

The question presented is: In an action for libel based on a telegram from sender to addressee containing statements of fact about plaintiff (assuming those statements are defamatory), is the Telegraph Company liable for damages where there is no proof that the company knew or had reason to know either that the message was false or that the sender was not privileged to send it?

Statement

The facts are not in dispute, and appear in the opinions of the Court of Appeals.

The action is for libel and the complaint contains two causes of action, only the second of which is the subject of this petition. The first cause of action was based upon a telegram, addressed to plaintiff and containing statements derogatory to him, filed with Western Union in the ordinary course of business by one Willingham on Saturday evening, October 26th, 1946. As to it the judgment of the Court of Appeals entered July 23rd, 1952, was that the case be remanded for a new trial.

The second cause of action is based on a telegram filed with Western Union on Sunday, October 27th, 1946, by Willingham addressed to plaintiff's superior, Doctor James A. Hayne, Director of the State Board of Health, and delivered to him next day in the ordinary course of business, reading:

> "YOU NOR NO OTHER DEMOCRATIC POLITICIAN IS GOING TO BE BIG ENOUGH TO FIX THE DEATH THAT OCCURRED AT WHEAT AND WOOD STREETS CAUSED BY YOUR ADMINISTRATIVE ASSISTANT THOMAS LESESNE. I HAVE REPORTED THIS TO THE CIVIL RIGHTS SECTION OF THE UNITED STATES DEPT. OF JUSTICE. AFTER RECEIVING COVER ALL TACTICS FROM HIGHWAY PATROL AND COLUMBIA POLICE DEPT."

In passing, the text of the message contained nothing libelous to plaintiff, it being a conceded fact that plaintiff did cause the death of the person as referred to in the message, this irrespective of any defamation in the text of the message as to Doctor Hayne, the addressee. Assuming, however, that the message was defamatory, it is the contention of the Telegraph Company that, under established principles of law, it was clothed with a privilege as a matter of law and, in the absence of any proof that it knew or should have known the sender was not privileged to send it, defendant's motion for a directed verdict should have been granted.

The case was tried twice. The first trial resulted in a verdict for defendant on the first telegram, set aside by the trial court, and a verdict for plaintiff for $2,000 on the second telegram. On the first appeal the Court of Appeals (182 Fed. 2d 135) reversed as to the second telegram for erroneous rulings on evidence, and did not consider the ruling setting aside the verdict for defendant on the first telegram, that not being appealable. The second trial resulted in a verdict for plaintiff as to both telegrams, for $9,416.66 on the first message, which was reduced by the trial court on remission by plaintiff to $5,700, and for $1,833.34 on the second message. On the second appeal the Court of Appeals (198 Fed. 2d 155) reversed as to the first telegram for erroneous instructions, remanding the case for a new trial; and, as to the second message, affirmed the District Court judgment, stating that it adhered to the conclusion in its prior opinion for the reasons stated therein (182 Fed. 2d 135). At each trial and as to each message, defendant's motions for a directed verdict and for judgment n. o. v. were overruled.

Both telegrams were intracity, *i. e.*, from the sender in Columbia, South Carolina, to the respective addressee in the same city. Each message was delivered by Willingham to Western Union by telephone and the tolls charged to

Willingham's telephone bill. Each message was a night letter, but they were sent at different times. The first was filed at 10:45 P. M. on Saturday, October 26th, 1946, and was delivered the next day, Sunday morning, to plaintiff and accepted by plaintiff's wife, the testimony being that plaintiff at the time was sick in bed. The second message was filed on the evening of Sunday, October 27th, 1946, and was delivered to the addressee, Doctor Hayne, on Monday morning by teleprinter tie-line to the South Carolina Health Department of which Doctor Hayne was Director and plaintiff an employee.

The suit was not brought until approximately two years after the filing of the messages. Meanwhile, the messages had been destroyed six months after filing in the normal course pursuant to a rule approved both by the Federal Communications Commission and by the South Carolina Public Service Commission. After the institution of the suit, the Telegraph Company endeavored to ascertain which of its employees had handled the messages sued upon, but was unable to do so because of the destruction of all records which might have shown by the handwriting or initials which particular employees had handled the messages in any respect. At the time of filing of the messages there were sixteen employees in Western Union's office at Columbia.

The Telegraph Company pleaded affirmatively as to each of the two causes of action that the messages were received by it from the sender in the ordinary course of business and were transmitted and delivered without intent to injure plaintiff, and that defendant was not actuated by malice in so doing, and that each message was as to Western Union a privileged communication for which defendant was not liable to plaintiff; also that the Telegraph Company was under a duty to transmit each message since it did not know, or have reason to know, that the sender was not privileged to send the message, and hence the Tele-

graph Company was not liable to the plaintiff for any damages resulting from the acceptance and transmission and delivery of the two messages.

It was conceded at the trial that neither the Telegraph Company nor its employees who accepted, transmitted and delivered the two messages had any malice or ill will toward the plaintiff and there was no proof that the Telegraph Company knew or had reason to know that the message was false or that the sender was not privileged to send it, apart from the message itself which the Court of Appeals held was capable of a construction that indicated that the message *was privileged* as between tha sender and addressee.

Reasons for Granting the Writ

The Court of Appeals here holds that the Telegraph Company is liable in damages for libel based on a telegraph message, even in the absence of any affirmative proof that the message was false or that the sender was not privileged to send it, where the text of the message is capable of two conflicting inferences, one that the sender was privileged to send it, and the other that he was not so privileged. This is a question of particular importance in telegraph law (which has not been decided by the South Carolina courts), the decision of which is clearly erroneous, is contrary to justice, is in conflict with the decision of the First Circuit in *O'Brien* v. *Western Union,* 113 Fed. 2d 539, and is in conflict with settled principles of general law as epitomized in the rule of liability adopted by the American Law Institute in its Restatement of the Law of Torts, Vol. 3, Sec. 612, as follows:

> "A public utility whose duty it is to transmit messages for the public is privileged to transmit a message although it is obviously defamatory, unless the

agents who transmit it know or have reason to know that the sender is not privileged to send it."

The concept of a standard, prompt, uniform and non-discriminatory record communications service is recognized by both Federal and State statutes. (Communications Act of 1934, 47 U.S.C.A., Sec. 151, et seq. and Section 8548, South Carolina Code of 1942). These enactments are declaratory of the common law.

The Court of Appeals recognized this statutory and common law function of the Telegraph Company. It recognized that speed is of the essence of the telegraph business. It recognized that the number and character of the minor employees needed in the business and the difficulty of legal questions involved in considering defamation in messages made it impracticable for the Telegraph Company to withhold delivery of messages until it could make an investigation as to the truth of the messages or their privileged character. It recognized also that there was no evidence in this case, apart from the text of the message itself, available to the Telegraph Company or its employees as to the truth of the statements in the message or as to whether or not the sender was privileged to make the statements. It also recognized that as conceded at the trial neither the Telegraph Company nor its employees who handled the messages had any malice or ill will toward the plaintiff.

Despite all this, the court in its second opinion adhered to its "conclusion announced in the prior opinion for the reasons stated therein." In the prior opinion, 182 Fed. 2d 135, the court said at page 138:

> "When the telegrams in suit are examined with these rules in mind, they seem to give rise to conflicting inferences. On the one hand it is clear that the sender desired to bring to the attention of responsible

officials the reprehensible conduct of a subordinate of so grave a character as to warrant an inquiry into his fitness for further public service; and on the other hand, the abusive and insulting epithets applied to the plaintiff and the charge that he and his superior were endeavoring to suppress the inquiry into his wrongdoing through improper political influence might well give rise to the inference that the sender of the telegram was moved by ill will rather than a sense of public duty. Hence it cannot be said that the evidence was of such a character as to justify only one conclusion, and it follows that the District Judge did not err in refusing to direct a verdict for the defendant and in leaving it to the jury to determine whether the agents of the Telegraph Company, who received and transmitted the messages, had reason to know from the nature of their contents that they were not privileged but were sent in bad faith to defame the plaintiff."

If there are two conflicting inferences as stated by the Court of Appeals, one supporting privilege on the part of the sender and the other not, to be drawn from the text of a libelous message, it is clear that the Telegraph Company cannot be said to have knowledge that the sender was not privileged, and cannot do otherwise than accept and forward the message. If the agent of the Telegraph Company has no evidence that the message is false or that the sender is not privileged, he is not required before sending the message to make further investigation.

The ruling of the court below would require the Telegraph Company either first to make an investigation to determine whether the message was false or whether the sender was acting in bad faith and not for the purpose of protecting the public interest. The Telegraph Company

would thereafter, according to the decision below, be at the mercy of a jury as to whether the Company's agent had made a good or a bad guess. If the agent concluded that the sender was, or even might be, privileged to send the message and hence accepted it and a jury later concluded that the agent's guess was wrong, the Telegraph Company can be mulcted in damages. On the other hand, should the agent conclude that the sender was not, or might not be privileged to send it, and hence refused the message, and a jury should later determine that this guess was wrong, the Telegraph Company could be held liable for the penalty for failure to accept the message (47 U. S. C. A. s. 501 or s. 8548, South Carolina Code of 1942).

The holding below conflicts with the decision in *O'Brien* v. *Western Union,* 113 Fed. 2d 539, in the First Circuit as well as with such decisions as *Klein* v. *Western Union,* 257 N. Y. App. Div. 336, 13 N. Y. Supp. 2d 441; appeal dismissed 281 N. Y. 831, 24 N. E. 2d 492.

It is clear that the receiving clerks in this case had no more reason to know that the sender was not privileged to send the messages than were the receiving clerks in the *O'Brien* and *Klein* cases. In both the *O'Brien* and *Klein* cases the language of the telegram was clearly libelous and defamatory with respect to the plaintiff. In both cases the court held that the Telegraph Company must accept and transmit the message in the absence of some affirmative evidence of lack of privilege. The Circuit Court in the *O'Brien* case recognized that under such rule a case of liability against the Telegraph Company would necessarily be a rare case. The court said:

> "Our conclusion is that if the telegraph company is ever to be held liable for the routine transmission of a defamatory message *it could only be in the necessarily rare cases* where the transmitting agent of the tele-

graph company *happened to know* that the message was spurious or that the sender was acting not in the protection of any legitimate interest but in bad faith and for the purpose of traducing another." (Emphasis ours.)

Likewise in the *Klein* case the court said:

"Here there was nothing to show that the statements were not true or that as between the sender and addressee it was not a privileged communication. Upon the evidence we are of the opinion that as a matter of law any implied malice was rebutted and that the verdict of the jury so far as it is a finding that defendant did not act in good faith was contrary to the weight of the evidence."

We respectfully submit that the only sensible, reasonable and just rule of liability is that set forth in the Restatement and in the *Klein* and *O'Brien* cases as indicated above. The application of those rules to the evidence in this case requires a reversal of the judgment since there was no evidence appearing from the message that the transmitting clerks had reason to know that the statements contained in the message were false or that the sender was not privileged to make such statements. In the language of the opinion in the *Klein* case:

"Here there was nothing to show that the statements were not true or that as between the sender and addressee it was not a privileged communication."

Also, in the language of the opinion in the *O'Brien* case this is not the necessarily rare case:

"Where the transmitting agent of the telegraph company happened to know that the message was

spurious or that the sender was acting not in the protection of any legitimate interest but in bad faith and for the purpose of traducing another."

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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